Supreme Court, U.S.
FILED
MAY 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-473

In The
Supreme Court of the United States
October Term, 1986

GWALTNEY OF SMITHFIELD, LTD.

Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.

and

NATURAL RESOURCES DEFENSE COUNCIL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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STATEMENT OF INTEREST

The amici states submit this brief in support of respondents Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council. Except for New Mexico and Maine, the amici states regulate discharges of pollutants to navigable waters within state boundaries through their National Pollutant Discharge Elimination System ("NPDES") permit licensing programs. These permit programs have been approved by the Administrator of the United States Environmental Protection Agency ("EPA") pursuant to section 402 of the Clean Water Act (33 U.S.C. § 1342).[1] An NPDES permit, through the establishment of effluent limitations, limits the type and quantity of pollutants discharged to navigable waters.

The amici states rely on the citizen suit provision of the Clean Water Act (section 505(a)) in seeking civil penalties against federal facilities which have violated the effluent limitations in their NPDES permits.[2] Further,

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1. The Clean Water Act (33 U.S.C. § 1251 et seq.) was officially entitled "the Federal Water Pollution Control Act" until it was amended in 1977. For brevity purposes the Federal Water Pollution Control Act and the Clean Water Act will be referred to herein as the Clean Water Act or the Act. The Clean Water Act was recently amended by the Water Quality Act of 1987. Pub.L. 100-4, 101 Stat.7. These amendments will be referred to herein as the Water Quality Act of 1987.

All section references herein are to the Clean Water Act unless otherwise indicated.

2. Federal facilities are considered among the nation's worst polluters. S.Rep. No. 414, 92d Cong., 1st Sess. 80 (1971); Goldman, Cleaning Up the Federal Polluters: Tax-Supported Toxic Waste, 239 Nation 550, Nov. 24, 1984. Thus, the United States has the same incentive as petitioner and industry amici herein to limit the application of section 505(a). Therefore, the views expressed by the United States in this case regarding the proper interpretation of section 505(a) are those of a discharger, not simply those of a regulator.

some states rely on section 505(a) (33 U.S.C. § 1365(a)) in seeking civil penalties against private dischargers. As explained below, civil penalties are an important means of compelling compliance with the Clean Water Act. Thus, amici states have a strong interest in being able to seek civil penalties under section 505(a) for past violations.

SUMMARY OF ARGUMENT

State amici believe the Fourth Circuit correctly decided the case below for several reasons.

First, section 505(a) incorporates by reference section 309(d) of the Clean Water Act (33 U.S.C. § 1319(d)), which has been interpreted by the courts to allow penalties for past violations. Second, the legislative history of the Clean Water Act makes clear that the rights of citizens under section 505(a) are coextensive with the rights of the EPA Administrator, who can undoubtedly seek civil penalties under section 309(d) for past violations. Third, the legislative history of the Clean Water Act removes any doubt that civil penalties may be imposed under section 505(a) for past violations. Fourth, the "alleged to be in violation" language in section 505(a) does not limit civil penalties to ongoing violations.

Petitioner and industry amici believe section 505 should be interpreted narrowly. They argue that the "alleged to be in violation" language in section 505(a) must be read literally, but they suggest a jurisdictional test that departs from such a literal interpretation. As we will explain below, if section 505(a) is read literally, it can have only one of two meanings. Either civil penalties are authorized for past violations, or civil penalties are authorized only for violations that are occurring at

the precise moment that a citizen suit is filed. As will be evident, the language of the Clean Water Act and its legislative history indicate that only the first reading is correct.

Petitioner and industry amici also make several policy arguments for a restrictive interpretation of section 505(a). If, as they contend, the citizen suit provision is subject to abuse, it is a problem appropriately remedied by Congressional action and, to date, Congress has not indicated that it shares petitioner's and industry amici's view of citizen suits. Petitioner and industry amici also argue that civil penalties for past violations do not further the purpose of the Clean Water Act, but this assertion ignores the deterrent value of civil penalties.

ARGUMENT

I

CITIZENS SUING UNDER THE CLEAN WATER ACT MAY SEEK CIVIL PENALTIES FOR PAST VIOLATIONS

A. Under Clean Water Act Section 309(d) Citizens Can Seek Civil Penalties For Past Violations.

Section 505(a) authorizes any citizen to commence a civil action against any person "who is alleged to be in violation" of an effluent standard or limitation. Under section 505(a), the district court may grant injunctive relief, and also may impose any appropriate civil penalties under section 309(d) of the Clean Water Act.[3] Thus, in

3. Section 309(d) provides that any person who violates specified sections of the Clean Water Act or any permit condition or limitation implementing any of such sections in an NPDES permit issued by the EPA Administrator or by a state shall be subject to a civil penalty not to exceed $25,000 per day of such violations. When the Clean Water Act was amended by the Water Quality Act of 1987, civil penalties were raised from $10,000 to $25,000 per day.

effect, penalties provided in section 309(d) are incorporated by reference into section 505(a).

Under section 309(d), the EPA Administrator can seek civil penalties for past violations. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375-76 (10th Cir. 1979); *United States v. Detrex Chemical Industries, Inc.*, 393 F. Supp. 735 (N.D. Ohio 1975); *SPIRG v. AT & T Bell Laboratories*, 617 F.Supp. 1190, 1197 (D.N.J. 1985); *SPIRG v. Monsanto Co.*, 600 F.Supp. 1474, 1476 (D.N.J. 1985); *Tull v. U.S.*, 55 U.S.L.W. 4571, — U.S. — (April 28, 1987). Since section 309(d) is incorporated by reference into section 505(a), citizens necessarily have the same right as the EPA Administrator to seek penalties for past violations. If section 505(a) were interpreted narrowly to disallow citizen suits for past violations, section 309(d) would be interpreted differently depending on whether the penalty action is brought by the Administrator or a citizen. Nothing in the Act or its legislative history indicates Congress intended such an illogical result. Had Congress intended to limit imposition of civil penalties in citizen suits to ongoing violations, it would have expressly limited the application of section 309(d) or omitted any reference to section 309(d) penalties in section 505(a).

The legislative history of the Clean Water Act supports a finding that citizens have comparable enforcement authority to that of the EPA Administrator. The Senate Report states:

> "It should be noted that if the Federal, State and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provision of section 505." S.Rep. No. 414, 92d Cong., 1st Sess. 64 (1971).

The Senate Report further states:

> "The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore, the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy." *Id.* at 80.

In describing the Conference Report accompanying the Clean Water Act bill in 1972, Senator Muskie, the principal author of the Senate bill, emphasized the coextensive nature of EPA and citizen suit enforcement authority:[4]

> "The Administrator's authority is not limited to those cases in which there is a continuing violation. Any discharge, intermittent or continuous, which the Administrator finds violates the terms of the permit, is to be enforced . . . Citizen suits can be brought to enforce against both continuous and intermittent violations." 118 Cong. Rec. 33693 (1972).

The importance of citizen suits as a complementary enforcement tool to EPA action was noted by the Senate in considering the recent amendments to the Clean Water Act. The Senate Committee on Environment and Public Works concluded that:

> "Citizen suits are a proven enforcement tool. They operate as Congress intended to both spur and supplement government enforcement actions. They have deterred violators and have achieved significant compliance gains." S.Rep. No. 50, 99th Cong., 1st Sess. 28 (1985).

Thus, the legislative history of the Clean Water Act and the recent amendments to the Act indicates that citizens

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4. In *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129 (1977), Justice Stevens called Muskie "perhaps the Act's primary author", and quoted Muskie's remarks extensively to support the Court's opinion.

share the same authority as the EPA Administrator to seek civil penalties for past violations.[5]

In summary, since the district court in a citizen suit is authorized to impose any appropriate civil penalties under section 309(d) and the EPA Administrator is authorized to sue for past violations under section 309(d), citizens must also have the same authority. Otherwise, section 309(d) would be interpreted differently depending on whether the suit is brought by the EPA Administrator or a citizen.

B. The Legislative History of the Clean Water Act Supports Imposition of Penalties for Past Violations Under Section 505.

The legislative history of the Clean Water Act unequivocally demonstrates that section 505(a) authorizes civil penalties for past violations, even if those past violations have not continued to the present. Senator Muskie, in submitting the Conference Report to the Senate in 1972, explained the citizen suit provision as follows:

> "The Conferees accepted a provision requiring that citizens seeking to bring an action give appropriate notice and wait 60 days before filing suit and to give the appropriate administrative agencies a chance to act.
>
> "This 60-day provision was not intended, however, to cut off the right of action a citizen may have to violations that took place 60 days earlier but which may not have been continuous. As in the original

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5. Several district courts have opined that "the remedies obtainable in citizen suits should be coextensive with those available in suits initiated by the federal government." *Connecticut Fund for the Environment v. the Job Plating Co., Inc.*, 623 F.Supp. 207, 213 (D. Conn. 1985). Accord, *SPIRG v. Georgia-Pacific Corp.*, 615 F.Supp. 1419, 1425 (D. N.J. 1985); *SPIRG v. Monsanto Co., supra*, 600 F.Supp. at 1476-1477; *SPIRG v. AT&T Bell Laboratories, supra*, 617 F.Supp. at 1199.

> Senate bill, a citizen has a right under section 505 to bring an action for an appropriate remedy in the case of any person who is alleged to be, *or to have been*, in violation, whether the violation be a continuous one, *or an occasional or sporadic one.*" 118 Cong. Rec. 33700, *supra* (statement of Sen. Muskie), 1 *Leg. Hist.* 179 (emphasis added).

Senator Muskie's statement that a citizen suit may be brought when a person is "alleged to be, or to have been, in violation" of the Clean Water Act leaves no doubt that civil penalties may be sought under section 505(a) for past violations.

The legislative history of the 1987 amendments to the Clean Water Act also makes clear that citizens can obtain civil penalties for past violations. In the Senate Report discussing the preclusive effect of the new administrative civil penalty proceedings on citizen suits, it was stated that this preclusive effect:

> "would not apply to an action for civil penalties for a violation of the same requirement of the act that is not being addressed administratively or *for a past violation* of another pollutant parameter (even one resulting from the same discharge which is the subject of the administrative civil penalty proceeding)." S.Rep. No. 50, *supra*, at 28 (emphasis added).

Thus, the Senate Report accompanying the 1987 Clean Water Act amendments acknowledges a citizen's right to seek civil penalties for past violations.

Significantly, nothing in the legislative history of the Clean Water Act or the 1987 amendments supports the view of petitioner and industry amici that civil penalties may only be imposed for ongoing violations. Petitioner cites several passages from the Senate Report and the hearing record which refer to citizen suits as a useful tool to abate violations. Pet. Br. 26-27. Upon reviewing the context in which these statements were made, it becomes clear that Congress was addressing the circumstances re-

quired for obtaining injunctive relief and not addressing the circumstances when civil penalties might be appropriate. Indeed, when Congress focused on the circumstances when civil penalties were appropriate, the principal author of the Senate bill stated that a citizen can sue "any person who is alleged to be, or *to have been*, in violation" of the Clean Water Act. 118 Cong. Rec. 33700, *supra* (statement of Senator Muskie), 1 Leg. Hist. 179 (emphasis added).

C. The "Alleged To Be In Violation" Language In Section 505(a) Does Not Limit Penalties to Ongoing Violations.

Petitioner and industry amici argue that the "alleged to be in violation" language in section 505(a) limits civil penalties to ongoing violations. For several reasons, this argument is unconvincing. As explained above, citizens possess the same authority to seek civil penalties for past violations as does the EPA Administrator because section 309(d) is incorporated by reference into section 505(a). Further, the above described legislative history of the Clean Water Act makes clear that citizens can seek civil penalties for past violations.

As we will now explain, the 1987 amendments to section 309 of the Clean Water Act also demonstrate that Congress did not intend the use of the present tense in section 505(a) to limit the imposition of civil penalties to ongoing violations. In section 309(g), which was added in 1987, Congress alternated between the past and present tense in describing the authority of the EPA Administrator and the Secretary of the Army to impose civil penalties administratively for violations of the Clean Water Act.[6]

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6. Section 309 as amended by section 314 of the Water Quality Act of 1987 provides in part:

(Continued on following page)

Sections 309(g)(1)(A) and (B) allow the Secretary of the Army or the EPA Administrator to impose penalties when

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(Continued from previous page)

"(1) Violations.—Whenever on the basis of any information available—

(A) the Administrator finds that any person *has violated* section 301, 302, 306, 307, 308, 318, or 405 of this Act, or has violated any permit condition, or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the 'Secretary') finds that any person has violated any permit condition or limitation in a permit issued under section 404 of this Act by the Secretary, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the *violation occurs*, assess a class I civil penalty or a class II civil penalty under this subsection.

"(2) Classes of Penalties.—

(A) Class I.—The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of title 5, United States Code, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II.—The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the *violation continues;* except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph." (Emphasis added.)

"any person *has violated*" certain provisions of the Act. (Emphasis added.) However, the Secretary or Administrator may only assess the penalty after consulting "with the State in which the *violation occurs.*" (Emphasis added.) Further, with regard to class II civil penalties, section 309(g)(2)(B) states the amount "may not exceed $10,000 per day for each day during which the *violation continues.*" (Emphasis added.)

If the present tense language in sections 309(g)(1) and (g)(2) was interpreted narrowly as petitioner and industry amici interpret the phrase "alleged to be in violation" in section 505(a), the Administrator and the Secretary of Army could not recover civil penalties for past violations. However, federal officials can indeed recover civil penalties for past violations under section 309(g). The Senate Report discussing the authorities of the United States under section 309(g) states as follows:

> "This new authority is designed to address past, rather than continuing violations of the Act. Continuing violations are more appropriately addressed by abatement orders or injunctive actions and, if EPA seeks both civil penalties and injunctive relief, one judicial action should be filed." S.Rep. No. 50, *supra*, at 26.

Thus, the alternating use of present and past tense in section 309(g) indicates that Congress did not intend to draw distinctions between past and present violations in authorizing citizens to seek civil penalties under section 505(a).

Moreover, the legislative history of section 309(g) also makes clear that Congress did not intend the "alleged to be in violation" language in section 505(a) to limit civil penalties to ongoing violations. Significantly, the U.S. House of Representatives used a phrase virtually

identical to the language at issue in this case in describing the Administrator's authority to impose administrative civil penalties under section 309(g). The report on the House bill amending the Clean Water Act states in pertinent part as follows:

> "The amendment authorizes the assessment of administrative civil penalties for violations of the Act. Whenever on the basis of any information available to him the Administrator finds that any person *is in violation* of section 301 (except with respect to a violation of section 404); 302, 306, 307, 318 or 405 of the Act or *is in violation* of any permit condition or limitation implementing any of these sections in a permit issued under section 402 of the Act, he may, after consultation with the state in which the violation occurs, assess a civil penalty of not more than $10,000 per day of violation, except that the penalty shall not exceed a total of $125,000." H. Rep. No. 1004, 99th Cong., 2d Sess. 135 (1986) (emphasis added).

As noted above, the legislative history of section 309(g) makes clear that the EPA Administrator and the Secretary of the Army have authority to seek administrative civil penalties for past violations. Since Congress did not intend to limit civil penalties under section 309(g) to ongoing violations by using the phrase "is in violation," it could not have intended that the virtually identical language in section 505(a) limit civil penalties to ongoing violations.[7]

In summary, the legislative history of the 1987 amendments and Congress' alternating use of the past and pres-

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7. Under the Clean Air Act, which employs language similar to the present tense language in section 505(a), the EPA Administrator has authority to seek penalties for past violations. *United States v. Chevron U.S.A. Inc.*, 639 F.Supp. 770 (W.D.Tex. 1985) The Clean Air Act provides that the EPA Administrator may bring an action for civil penalties based upon a finding that "any person is in violation" of requirements of the Act. 42 U.S.C. § 7413.

ent tense in section 309(g) further demonstrate that Congress did not intend that its use of the phrase "alleged to be in violation" in section 505(a) limit civil penalties to ongoing violations.

In *SPIRG v. Monsanto Co., supra,* 600 F.Supp. at 1476, the court held that "a plausible construction of the language [in section 505(a)] is that one is 'in violation' and continues to be 'in violation' by having 'violated' ". Such a construction of section 505(a) is particularly appropriate because of the nature of pollution violations. The harm caused by a violation of an effluent limitation is not confined to the day of discharge. Rather, the pollutants harm aquatic life and humans for many years. The immediate effects of an illegal discharge may be the closing of waters to swimming and fishing or the death of aquatic life. But the long term effects of such a discharge can also be serious, especially if the toxic substances are bioaccumulated in shellfish and other organisms that are consumed by humans. In addition, the cumulative effect of numerous violations of effluent limitations may be to limit beneficial uses of a water body. Thus, because of the nature of pollution violations, the phrase "alleged to be in violation" is appropriately construed to include past violations of the Clean Water Act.

Further, to interpret section 505(a) to allow civil penalties only for ongoing violations would be illogical. Civil penalties, by their very nature, are imposed for past conduct, whether or not the conduct is continuing or threatening to continue. See *SPIRG v. AT & T Bell Laboratories, supra,* 617 F.Supp. at 1198. In that respect, civil penalties are different from prospective relief, such as injunctions, which are imposed for conduct that is continuing or threatening to continue. The fact that conduct is

continuing, or not continuing, may be highly material in determining the *amount* of civil penalties. This fact, however, is immaterial in determining *whether* such penalties can be jurisdictionally imposed.

For the above reasons, the words "alleged to be in violation" in section 505(a) may reasonably be read to include unlawful conduct occurring before a lawsuit is filed as well as unlawful conduct that continues into the present.

D. Petitioner's View of Citizen Suit Jurisdiction Conflicts With Its Own Literal Reading of Section 505(a).

Petitioner and amici argue that section 505(a) should be interpreted literally, but then they advocate a jurisdictional test that departs from this literal approach. If the "alleged to be in violation" language in section 505(a) is read literally, one of two conclusions must be reached. Either no jurisdiction lies unless a violation is occurring on the day suit is filed or jurisdiction lies even if the violation is not ongoing. As we will now explain, only the second reading is correct.

The lower courts have adopted three different interpretations of section 505(a). The Fifth Circuit, in *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392, 395 (5th Cir. 1985), held that no civil penalties can be imposed under section 505(a) unless a violation is occurring on the day suit is filed. The Fourth Circuit, in *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 313 (4th Cir. 1986), held that citizens can seek penalties under section 505(a) for permit violations committed entirely in the past. The First Circuit, in *Pawtuxet Cove Marina Inc. v. Ciba Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), held that:

> "an action under 33 U.S.C. § 1365 may go forward if the citizen-plaintiff fairly alleges a continuing likeli-

> hood that the defendant, if not enjoined, will again proceed to violate the Act. In reviewing actions under this standard, the district court should consider, among other things, the isolated or recurrent nature of the infraction, the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations. Cf. *Bonastia*, 614 F.2d at 912. We thus agree with the result in *Hamker v. Diamond Shamrock Chemical Corp.* 756 F.2d 392 (5th Cir. 1985), in which the court held the plaintiff's allegation of a single, past violation to be insufficient. We do not, however, agree with the reasoning which, apparently, led the Louisiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were filed. See *Sierra Club v. Copolymer Rubber & Chemical Corp.*, 621 F.Supp. 1013, 1015 (M.D. La. 1985). A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable."

The *Pawtuxet* court, in further explaining its interpretation of section 505(a), stated that "the words 'is . . . in violation' should be sufficiently liberally construed to comport with the injunctive purpose of the act—conduct indicative of continuing or renewed violations justifying an injunction, as distinguished from matters over and apparently done with, that would not warrant one." *Id.* at 1093. Thus, under the *Pawtuxet* approach, a citizen may seek civil penalties under section 505(a) if the plaintiff "alleges a continuing likelihood the defendant, if not enjoined will again proceed to violate the act."

Petitioner and industry amici advocate the Court adopt the *Pawtuxet* approach even though such an approach is not supported by a literal reading of section 505(a)[8] Pet.

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8. Some of the industry amici take issue with the *Pawtuxet* court's holding that a plaintiff who makes allegations

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Br. 16-17; CBIA Br. 54-55; Ch. of Comm. Br. 18-19. The *Pawtuxet* court stated that civil penalties could be sought if there is "a continuing likelihood that the defendant, if not enjoined, will again proceed to violate the Act." *Pawtuxet*, *supra*, 807 F.2d at 1094. However, no such language is found in section 505(a). To determine whether jurisdiction is proper, *Pawtuxet* stated that courts must consider, among other things, "the degree of scienter on the part of the defendant, and the sincerity of its assurances against future violations." *Id.* However, neither of these considerations is mentioned in section 505(a). The *Pawtuxet* court likely invented its test to avoid the harshness of the *Hamker* approach, which disallows civil penalties unless the discharger is violating an effluent limitation precisely at the time a citizen suit is filed. Indeed, the *Pawtuxet* court admitted its interpretation of section 505(a) was not an absolute, literal application of the language. *Id.* at 1092. Thus, the *Pawtuxet* approach is inconsistent with the petitioner's and industry amici's argument that a literal approach should be adopted.

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warranting injunctive relief, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable. CBIA Br. 54-62; Ch. of Comm. Br. 21-25; Consolidated Rail Br. 11. These amici would require the allegations be proven before civil penalties could be awarded.

To further restrict the imposition of civil penalties, petitioner and some industry amici argue that even when the jurisdictional hurdle has been met, the district court cannot impose civil penalties for past violations of any permit parameter which was not being violated at the time suit was filed. Pet. Br. 16-17; Consolidated Rail Br. 13; BIA Br. 56-57. Under this interpretation of section 505(a), which has not been adopted by any court, a discharger could violate several permit parameters over the course of a year—causing serious harm to the environment—and could avoid civil penalties for all but one category of violation if only one permit parameter is being violated or is likely to be violated at the time a citizen suit is filed.

Moreover, the *Pawtuxet* approach is at odds with the legislative history of the Clean Water Act and the language in section 505(a) allowing section 309(d) penalties to be imposed. As explained above, this reference to section 309(d) penalties and the legislative history of the Clean Water Act make clear that civil penalties may be imposed under section 505(a) for past violations.

Turning to the *Hamker* approach, this approach, albeit based on a literal reading of section 505(a), is plainly wrong not only because it ignores the section's reference to penalties under section 309(d), but also because it is not supported by the legislative history of the Clean Water Act. The *Hamker* approach is also unworkable. Under EPA regulations, a holder of an NPDES permit is required to monitor its own discharges according to a schedule established in its permit. 40 C.F.R. 122.41(4). Since many NPDES permits do not require daily sampling, it would be impossible to know whether the defendant was violating an effluent limitation on the day the citizen suit was filed if defendant's effluent had not been sampled that day. Even if daily samples are taken, it would also be impossible for a citizen to know whether an effluent limitation was being violated on the day suit was to be filed because dischargers' monitoring reports are not available for citizens to review on a daily basis.

In addition, the *Hamker* approach is inequitable. If civil penalties were authorized only for ongoing violations, dischargers could intentionally violate the Clean Water Act and avoid civil penalties by bringing themselves into compliance just before a citizen suit was filed. With the 60-day notice requirement of section 505(b), a discharger could, in almost all cases, terminate an effluent limitation

violation before a citizen suit is filed and thereby avoid the imposition of civil penalties. One district court, noting "the evil that would be invited" by the *Hamker* approach, observed that "the potential polluter verging upon bankruptcy or shutdown for any reason would be tempted to disregard restrictive effluent controls, lured perhaps by an added incentive to maximize profits or reduce losses of an ailing business." *Sierra Club v. Hanna Furnace Corp.*, 636 F.Supp. 527, 529 (W.D.N.Y. 1985).

In summary, neither the *Hamker* nor *Pawtuxet* approach is supported by the language of the Clean Water Act or its legislative history. On the other hand, the *Gwaltney* approach is supported by both the legislative history of the Clean Water Act and the language of section 505(a) which allows courts to impose section 309(d) civil penalties in a citizen suit. As explained above, the rights of citizens are coextensive with the rights of the EPA Administrator, who can seek civil penalties for past violations under section 309(d). Thus, the Fourth Circuit in *Gwaltney* correctly decided that section 505(a) allows citizens to seek civil penalties for past violations.[9]

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9. In two briefs submitted by industry amici the argument is made that the Clean Water Act's authorization of citizen suits for civil penalties violates the separation of powers mandate of the United States Constitution. See amicus briefs filed by Rollins Environmental Services (NJ) Inc. and Bethlehem Steel Corporation, et al. The separation of powers question is not properly before this Court because it was not the issue on which the petition of certiorari was granted. Therefore, state amici will not address that issue. If the Court decides to rule on the separation of powers question, it is respectfully requested that the parties and all amici be given the opportunity to brief the issue.

II

PETITIONER'S POLICY ARGUMENTS FOR LIMITING CITIZEN SUITS DO NOT WARRANT A NARROW CONSTRUCTION OF SECTION 505

Petitioner asserts that it has consistently complied with the Clean Water Act and argues, along with industry amici, that courts should not have jurisdiction to consider the application of civil penalties against such model dischargers. Pet. Br. 9, 19-21; Mid Atlantic Legal Found. Br. 10-12; CBIA Br. 2. Petitioner and industry amici ignore the fact that district courts are authorized only to impose *appropriate* civil penalties and indeed have the discretion to impose no civil penalties or nominal penalties if circumstances warrant. Courts are well equipped to consider the equities of individual cases, taking into account factors such as the economic benefit gained by the violator; the degree of recalcitrance of the violator; the harm done to public health or the environment; and any unusual or extraordinary enforcement costs thrust upon the public. Indeed, in the 1987 amendments to the Clean Water Act, Congress directed the courts to consider the following factors in determining the amount of civil penalties imposed pursuant to section 309(d): "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." Section 313(c), Water Quality Act of 1987, Pub.L. 100-4, 101 Stat.7.

Citizen suits are merely a means of bringing within district court jurisdiction violations of the Clean Water Act so that appropriate civil penalties can be imposed. Since the judicial process contains the safeguards neces-

sary to avoid arbitrary imposition of civil penalties, the restrictions on citizen suits proposed by petitioner and industry amici are unnecessary.

Petitioner and industry amici also argue that the Court should narrowly interpret section 505(a) because environmental groups allegedly have abused citizen suit provisions in the Clean Water Act and other environmental statutes. Pet. Br. 31-36; Mid Atlantic Legal Found. Br. 10-12; Rollins Environmental Services Br. 15-17; CBIA Br. 37-48. Petitioner and industry amici cite instances where citizen groups have financially benefited from settlement of a Clean Water Act citizen suit. These statements are not supported by any evidence in the record.

Assuming arguendo that the allegations of petitioner and industry amici are true, their remedy is to seek and obtain federal legislation that will eliminate any such alleged abuses. Congress had the opportunity when it amended the Clean Water Act in 1987 to delete the citizen suit provision or limit its application. If petitioner and amici presented their views regarding citizen suit abuse to Congress—and we have no information to that effect—Congress turned a deaf ear, because citizen suit jurisdiction under section 505 was not limited when section 505 was amended in 1987. Indeed, in considering the recent amendments to the Clean Water Act, Congress noted the importance and value of citizen suits. The Senate Committee on Environment and Public Works concluded that:

> "Citizen suits are a proven enforcement tool. They operate as Congress intended—to both spur and supplement government enforcement actions. They have deterred violators and achieved significant compliance gains. In the past two years, the number of citizen suits to enforce NPDES permits has surged so that

such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act." S. Rep. No. 50, *supra*, at 28.

Even if petitioner and industry amici did not make known to Congress their concerns regarding citizen suits, this Court is not the proper forum in which to advocate changes in the law. Petitioner and amici present the Court with a political question which the Court has no jurisdiction to resolve. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Moreover, even if the Court were to narrowly interpret section 505(a) as petitioner and industry amici suggest, the alleged abuses of the citizen suit provisions would not be halted because citizens would retain the right to sue for injunctive relief and civil penalties if any violation is ongoing. Indeed, the hammer of injunctive relief may induce more violators to agree to settlements that benefit citizen groups than the threat of civil penalties.

In arguing for a court ruling that restricts citizen suits for civil penalties, petitioner and industry amici ignore the importance of section 505(a) to the states. States rely on section 505(a) in seeking civil penalties against federal facilities, which are immune from penalties arising under state law.[10] Further, section 505(a) may be the only

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10. Under Clean Water Act section 313, federal facilities are subject to "civil penalties arising under federal law." 33 U.S.C. § 1313. Section 309 of the Clean Water Act authorizes civil penalties to be imposed for violations of effluent limitations and other permit conditions. As explained above, section 309(d) penalties are incorporated by reference into section 505(a), which authorizes suit against the United States as well as private dischargers. Although not without dispute, all the appellate courts that have reviewed the question have determined that states are citizens within the meaning of section 505(a) and thus can seek civil penalties and injunctive relief under that

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vehicle for a state which has not been delegated authority by EPA to administer the NPDES permit program to seek civil penalties against a private discharger of pollutants. Thus, an interpretation of section 505(a) which limits civil penalties to ongoing violations would seriously hamper the enforcement ability of the states.

III

CIVIL PENALTIES ARE AN IMPORTANT MEANS OF COMPELLING COMPLIANCE WITH THE CLEAN WATER ACT

Petitioner and industry amici argue that the imposition of civil penalties for past violations does not further the purposes of the Clean Water Act. In making this argument, petitioners and industry amici ignore the deterrent value of civil penalties.

The goal of the Clean Water Act is to restore and maintain the quality of the nation's waters. Clean Water Act, section 101 (33 U.S.C. § 1251). The purpose of civil penalties is to assist in accomplishing this goal by deterring violations and encouraging voluntary compliance. *Tull v. U.S., supra*, 55 U.S.L.W. at 4574, — U.S. —; *U.S. v. Detrex Chemical Industries, supra*, 393 F.Supp. at 737-738. The deterrent value of civil penalties was recognized by EPA in drafting its civil penalty policy to be applied in enforcement actions under the Clean Water Act, the Clean Air Act and other environmental statutes. U.S. Environmental Protection Agency Civil Penalty Policy (Feb. 16,

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section. *Massachusetts v. United States Veterans Administration*, 541 F.2d 119 (1st Cir. 1976); *Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 631 (7th Cir. 1980), vacated and remanded on other grounds, 453 U.S. 917 (1981). But cf. *United States v. City of Hopewell*, 508 F.Supp. 526 (E.D. Va. 1980).

1984) BNA Federal Laws 41: 2991-3003. EPA's civil penalty policy provides in part as follows:

> "The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into non-compliance again (specific deterrance) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.
>
> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law." *Id.* at 2992.

Thus, civil penalties for both past and ongoing violations are an important tool to further the purposes of the Clean Water Act.

Further, to distinguish between past and ongoing violations in imposing civil penalties results in unfair and inequitable treatment of dischargers. If civil penalties were not allowed for past violations, dischargers could intentionaily violate the Clean Water Act and avoid civil penalties by bringing themselves into compliance just before a citizen suit is filed. Under petitioner's view of section 505(a), such a discharger would be allowed to

benefit from noncompliance while those who have complied with their effluent limitations are placed at a competitive disadvantage. Such a result would frustrate the purposes of the Clean Water Act and could not have been intended by Congress.

IV

THE WEIGHT OF JUDICIAL AUTHORITY SUPPORTS ALLOWING CITIZEN SUITS SEEKING PENALTIES FOR PAST VIOLATIONS

Virtually all courts that have considered the matter have held that citizens may sue for past violations. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, supra,* 791 F.2d at 313; *SPIRG v. AT&T Bell Laboratories, supra,* 617 F.Supp. at 1194-1199; *SPIRG v. Georgia-Pacific Corp., supra,* 615 F.Supp. at 1425-1426; *SPIRG v. Monsanto Co., supra,* 600 F.Supp. at 1486; *Connecticut Fund for the Environment v. The Job Plating Co., supra,* 623 F. Supp. at 213-214; *SPIRG v. Jersey Central Power & Light Co.,* 642 F.Supp. 103, 107 (D.N.J. 1986); *Sierra Club v. Hanna Furnace Corp., supra,* 636 F.Supp. at 529-530; *Alabama ex rel. Graddick v. Veterans Administration,* 648 F.Supp. 1208, 1211 (M.D. Ala. 1986); *Locust Lane v. Swatara Township Authority,* 636 F.Supp. 534, 539 (M.D. Pa. 1986); *Friends of the Earth v. Archer Daniels Midland Co.,* 24 Env't Rep. Cas. (BNA) 1993, 1995-1996 (N.D.N.Y. 1986); *SPIRG v. American Cyanamid Co.,* 23 Env't Rep. Cas. (BNA) 2044, 2049 (D.N.J. 1985); *SPIRG v. National Starch and Chemical Corp.,* 23 Env't Rep. Cas. (BNA) 1982, 1984 (D.N.J. 1985); *SPIRG v. Tenneco Polymers,* 602 F. Supp. 1394, 1399 (D.N.J. 1985); *Fishel v. Westinghouse Electric Corp.,* 617 F.Supp. 1531, 1541 (M.D. Pa. 1985); *Sierra Club v. Simkins Industries,* 617 F.Supp. 1120, 1126-1127, 1131-1132 (D. Md. 1985); *Sierra Club v. C.G.*

Manufacturing, Inc., 638 F.Supp. 492, 494 (D. Mass. 1985); *SPIRG v. Anchor Thread Co.*, 22 Env't Rep. Cas. (BNA) 1150, 1154 (D.N.J. 1984); *Sierra Club v. Aluminum Co. of America*, 585 F.Supp. 842, 854 (N.D.N.Y. 1984); *Sierra Club v. Raytheon Co.*, 22 Env't Rep. Cas. (BNA) 1050, 1053-1055 (D. Mass. 1984); *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F.Supp. 284, 286-287 (N.D.N.Y. 1984); *SPIRG v. Ragen Precision Industries*, D.N.J., No. 83-1604, December 19, 1983, Transcript of Proceedings, p.7.

In contrast, only a few decisions support petitioner's interpretation of the Clean Water Act. *Hamker v. Diamond Shamrock Chemical Co., supra*, 756 F.2d at 395; *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., supra*, 807 F.2d at 1093; *Sierra Club v. Copolymer Rubber & Chemical Corp.*, 621 F.Supp. 1013, 1015 (M.D. La. 1985), appeal pending, No. 85-3763 (5th Cir.); *Sierra Club v. Kerr-McGee Corp.*, 23 Env't Rep. Cas. (BNA) 1685, 1690 (W.D. La. 1985). Furthermore, since the district courts in Louisiana were compelled to follow the *Hamker* decision as the binding precedent in their Circuit, the *Hamker* and *Pawtuxet* decisions represent the distinct minority view of the lower courts.

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CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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